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Filing date: **11/04/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204777
Party	Plaintiff Apple Inc.
Correspondence Address	JOSEPH PETERSEN KILPATRICK TOWNSEND STOCKTON LLP 31 WEST 52ND STREET, 14TH FLOOR NEW YORK, NY 10019 UNITED STATES JPetersen@kiltown.com, AlJones@kiltown.com, ARoach@kiltown.com, agarcia@kiltown.com, NYTrademarks@kiltown.com, tadmin@kiltown.com
Submission	Plaintiff's Notice of Reliance
Filer's Name	Allison Scott Roach
Filer's e-mail	JPetersen@kiltown.com, AlJones@kiltown.com, ARoach@kiltown.com, agarcia@kiltown.com, NYTrademarks@kiltown.com, tadmin@kiltown.com
Signature	/Allison Scott Roach/
Date	11/04/2013
Attachments	2013-11-4 NOR-2 (W-Exh.).pdf(262335 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. **85/379,097**

For the mark: **CRAPPLE**

Filed: July 22, 2011

Published: December 20, 2011

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APPLE INC.,	:	
	:	Opposition No. 91204777
Opposer,	:	
	:	
v.	:	
	:	
NINJA ENTERTAINMENT	:	
HOLDINGS, LLC,	:	
	:	
Applicant.	:	
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OPPOSER’S SECOND NOTICE OF RELIANCE

Opposer Apple Inc. (“Apple”), pursuant to 37 C.F.R. §§ 2.120(j)(3)(i) and 2.120(j)(8), submits of record in connection with this opposition proceeding copies of Applicant Ninja Entertainment Holdings, LLC’s (“Applicant’s”) initial and supplemental responses to Apple’s First Set of Interrogatories, along with a copy of Apple’s First Set of Interrogatories.¹

These interrogatory responses are relevant to the issues of likelihood of confusion and dilution and show, among other things, the purported circumstances surrounding Applicant’s selection of the mark at issue in this opposition proceeding (“Applicant’s Mark”), Applicant’s awareness of Apple’s marks, the nature and geographic scope of Applicant’s past and intended use of Applicant’s Mark, Applicant’s past and intended channels of trade, Applicant’s typical or

¹ Apple has included Opposer’s First Set of Interrogatories in compliance with 37 C.F.R. §§ 2.120(j)(3)(i) because Applicant’s July 16, 2013 Supplemental Responses do not in every instance include the interrogatory to which Applicant provided a response.

target customers, the individuals purportedly responsible and knowledgeable about certain of Applicant's operations and certain aspects of Applicant's use and intended use of Applicant's Mark, and Applicant's knowledge of communications, suggestions, or inquiries regarding an association, connection, or affiliation between Applicant, Applicant's Mark, or Applicant's goods and services, on the one hand, and Apple, Apple's marks, or Apple's goods and services, on the other hand.

Applicant's January 30, 2013 Responses to Apple's First Set of Interrogatories are attached hereto as Exhibit A; Applicant's July 16, 2013 Supplemental Responses to Apple's First Set of Interrogatories are attached hereto as Exhibit B, and Apple's First Set of Interrogatories to Applicant are attached hereto as Exhibit C.

Respectfully submitted,

Dated: November 4, 2013

KILPATRICK TOWNSEND & STOCKTON LLP

By: /s/Allison Scott Roach
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Attorneys for Opposer Apple Inc.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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	:
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on Ninja Entertainment Holdings, LLC by depositing a copy with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to:

Daniel Kelman
1934 Josephine Street
Pittsburgh, Pennsylvania 15203

This the 4th day of November, 2013.

/s/ Alberto Garcia
Alberto Garcia

EXHIBIT A

January 30, 2013

Daniel J. Kelman
(917) 426-5073
danielkelman1@gmail.com

Via Email

Re: Apple v. Ninja: Response to Discovery Requests

Alicia and Joe,

I apologize for the delay. Included below is the information you requested in your discovery demands. The numbered questions from your interrogatories are followed by answers. As stated before, my inbox contains no relevant correspondence between Milton Barr and myself. To the extent Crapple and an association with Apple is mentioned, such is the product of an attorney-client consultation and not discoverable.

Best,

Daniel Kelman

1. Describe in detail the circumstances surrounding the selection, adoption, use, and intended use of Applicant's Mark, including but not limited to any other names or marks that were considered.

Milton Barr is in the business of buying and selling electronics. Milton hit upon an idea to purchase more electronics: create a website offering to purchase items. Milt decided to create such a website specializing in the purchase of smart phones, reasoning that the market for smartphones was rapidly growing and that people would be amenable to second hand purchase as the price of new smartphones remains comparatively high. Daniel had for quite some time been Milton's business attorney and at times partnered with him in business. Daniel agreed to help with the matter.

In order to sell the idea of purchasing second-hand smartphones to consumers, Milt and Daniel sought a name that would poke fun at the notion that the phones were no longer status symbols. To convey this message they considered numerous different adjectives and modified them with appropriate sounding "I" endings.

In selecting nouns, they sought a noun that would combine the messages of frugality, pro-environment, pro-recycling and urban. To accomplish this, a brand name was sought that would poke fun at the notion of a smart phone as a status symbol. A used phone might be considered "crud", "crap", or "junk", "garbage",

trash", "shit"—there are many such ways to convey the perceived quality of a used phone and we considered plenty.

In selecting an ending to modify our noun, we decided to place an extra "l-sound" at the end. For instance, "junk" becomes "junkle"; "shit" becomes "shittle" (my personal favorite, but too controversial for American markets) "garbage" becomes "garbagelle"; "trash" becomes "trashelle". "Crap" and "crud" both have options: they modify nicely as "Crapple", "Crapelle" "Crappelle", or "Crudelle", "Cruddle". Ultimately, "Crapple" was chosen because "Crappelle"/"Crapelle" and all "elle" words sounded and looked too French (there was a desire avoid association with high end products and keep it American). It was close between "Cruddle" and "Crapple", but "Cruddle" sounds too much like the word "cradle" and an association between used cell phones and an outdated term for something you put a baby in was decided to be not advantageous.

You may be curious why we wanted to modify the brand to be named in by adding an "l-sound" in such a way. Daniel's brother, Zachary Kelman, some years back owned a flawed cell phone that often misplaced an extra "l" at the end of a sentence. Daniel and Zachary at times joked when chatting by adding an extra "l" to the end of their spoken nouns. It became something that caught with friends as well when drinking (e.g. "drinkle").

It did dawn on us that the name was similar to "Apple", but we reasoned that there was zero chance that any consumer would think that the Crapple brand was associated with the richest corporation in the world by marker capitalization.

2. Describe in detail how and why Applicant's Mark was selected.

See answer to question 1.

3. Describe in detail all steps taken by Applicant to determine whether Applicant's Mark was available for use and registration prior to adoption.

We were well aware of both "Apple" and "Free Crapple" that were registered.

4. Describe in detail when, where, and how Applicant's Mark is used and/or intended to be used.

Please see answer to question 1.

5. Identify each Person involved with or having knowledge of the selection, adoption, or first use of Applicant's Mark, and describe each such Person's knowledge.

Milton Barr and Daniel Kelman are the exclusive authors of this project and it was not revealed publicly until after the domain "crapple.com" was purchased and significant resources expended to make such a reality. The primary reason for this

was to prevent anyone else from trying to purchase the domain and driving up the price.

6. Describe in detail when and how Applicant first became aware of Opposer or Opposer's APPLE Marks, including the identification of all individuals having knowledge thereof.

Milton Barr and Daniel Kelman are unable to remember when they first became aware of Opposer's marks. But both agree that it was likely in elementary school playing Oregon Trail in the computer lab.

7. Identify each good or service for which Applicant has used or intends to use Applicant's Mark.

We plan to use the name Crapple to operate a website that purchases used smartphones. The smartphones will be repaired/refurbished and resold. At this point we have not determined whether we will resell the phones as "Crapple" phones, but we plan on selling through store fronts and on online auction sites.

8. Identify the Channels of Trade through which Applicant distributes, has distributed, or intends to distribute Applicant's Goods and Services.

Crapple only delivers a service: Crapple will buy your phone and resell or recycle it. Everything is done online and through the mail.

9. Identify Applicant's typical or target customers of Applicant's Goods and Services.

Any person who supports the environment, wants to pay less for a smartphone and doesn't mind that it was used.

10. Identify the annual unit and dollar volume of sales, from the date of first use to the present, for Applicant's Goods and Services.

We have not purchased a single phone through www.crapple.com. We have postponed putting further funds into this idea until after this proceeding. It is well known the chilling effects these kinds of suits have on commerce.

11. Identify Applicant's annual expenditures for each advertising or promotional medium used to promote Applicant's Goods and Services.

This number is tough to quantify because it is difficult value the opportunity cost represented by the time spent working on the project.

12. Identify the Person(s) most knowledgeable about the sales and marketing efforts concerning Applicant's Goods and Services, and state the duties and position of each such individual.

Daniel Kelman and Milton Barr worked exclusively on the planning of Crapple, but along the way there were people who helped out with technical aspects, such as setting up the website.

We hired Masudur Rahman to build and design Crapple.com. We hired him on odesk.com because he was affordable and had a good rating. He was responsible for making sure the site was running properly.

13. Describe in detail each instance of which Applicant has actual or hearsay knowledge, directly or indirectly, of any communication, suggestion, or inquiry regarding an association, connection, or affiliation between Applicant, Applicant's Mark, or Applicant's Goods and Services, on the one hand, and Opposer, Opposer's Marks, or Opposer's Goods and Services, on the other hand, identify each Person involved in having knowledge of each such inquiry or communication.

There are plenty. People sometimes laugh or remark "that's funny" or something to that effect.

14. Describe in detail all instances of which Applicant has actual or hearsay knowledge of any inquiry, complaint, or other communication regarding Applicant's business or any other inquiry, complaint, or other communication by any Person regarding the qualities, advantages, or lack of quality of Applicant's Goods and Services, and identify each Person involved in or having knowledge of such inquiry, complaint, or communication.

At times there are complaints from Ninja Entertainment customers regarding an electronic device which ceases to work properly. The frequency of such an occurrence is not tracked, as it may be in the sale of new electronics. In the second-hand business we usually accommodate the customer with a discount on the new item sufficient to keep their business.

15. Identify every Person believed by Applicant to have relevant information with respect to any issue in this lawsuit and identify the relevant information such persons are likely to possess.

Milton Barr and Daniel Kelman. Everything.

Nigel Clouse. He was the original owner of Crapple.com and we purchased it from him. I do not recall the specifics of what we discussed, and I'm not sure of the value of it since it was mostly puffery surrounding a business deal.

Zachary Kelman. I am not sure the extent of what he knows, but he knows a lot about Crapple. He is a law student and my brother and has worked with me discussing legal aspects of this matter. His circa 2006 phone and/or his method of typing on it was/were responsible for trying to make popular the placing of an "l" at the end of a word to emphasize its importance in a sentence.

Masudur Rahman. He designed the Crapple website and did work to maintain it. He is also a professional cricket player in Bangladesh.

EXHIBIT B

July 16, 2013

Dear Kilpatrick Townsewnd Harris attorneys Joe and Alicia,

I am writing to address your concerns regarding my discovery disclosure to you. I believe there has been some misunderstandings and I want to clear them up so you have all the relevant information required to present your case in this proceeding.

Since you are in possession of my prior disclosure as indicated by your motion to compel, to which I am replying with this letter, let me begin by stating that I will not be rehashing what I already disclosed. Instead, I will be replying point by point to the replies you took issue with in your motion to compel. I hope this satisfies your request.

Privilege

There exist no unprivileged emails between Daniel and Milton regarding CRAPPLE. Milton and Daniel do not frequently exchange emails regarding business, they prefer telephone conversation. This is in part because of a motor control disorder Milton I. Barr suffers from. Since childhood, Milton has struggled with small motor control, which makes typing and writing difficult for him; in high school he was allowed to use a special keyboard to type instead of handwrite tests, which was still difficult for him. Conversation is a much more convenient medium of communication. Moreover, Milton and Daniel both adhere to a policy of deleting emails older than 90 days from email web servers (there are no Fourth Amendment protections afforded to such stored communications), which means such emails, if they exist, are no longer in Applicant's possession.

Moreover, there are no unprivileged documents. This project consists of oral conversations between Daniel Kelman and Milton Barr, an application to the USPTO and a website that has been public and the information therefrom already disclosed to Opposer.

Interrogatory Responses Are Complete

I restate all disclosures made to date and the following is a response to the issues raised by

Opposer in their letter dated February 27, 2013 and the motion that resulted thereafter dated February 26, 2013.

Interrogatory No. 11:

Interrogatory No. 3: Describe in detail all steps taken by Applicant to determine whether Applicant's Mark was available for use and registration prior to adoption.

Opposer made clear by mounting attorney-client privilege objections that Applicant consulted an attorney prior to registration or adoption—this was the step taken to determine whether mark was available, which included a trademark search of the USPTO. Thus, applicant consulted an attorney who made a mark search—is more required? Opposer complains that Applicant has not provided sufficient information to answer this question, but there is a dearth of relevant and unprivileged information here. Short of admitting that Applicant was aware of the registrations of the marks “FREE CRAPPLE” and “APPLE”, it is unclear what relevant, unprivileged information exists. Milton I. Barr initially consulted Daniel Kelman, Esq. for counsel on this issue and those conversations remain privileged. The discussions were oral in nature and there exists no accurate record at this point as to when they were had. Regardless, given the foregoing admission of knowledge of the CRAPPLE and FREE CRAPPLE marks, such information is not relevant.

Interrogatory number 4: In 2012 Applicant's mark was used to on a webpage that stated “Crapple is coming in 2013”. Next, the site was updated to offer some products that Crapple was willing to pay customers for so they could be recycled, or fixed and resold as second hand merchandise through other channels of ecommerce and not under the Crapple name. But there were never any customers. Not one. Opposer is aware of this and has visited the site. That is all. There have been no other uses of the Crapple mark. Applicant's mark has intended uses as the brand for a service that will purchase and recycle used electronics, but such plans have been put on hold pending the outcome of this Opposition out of respect for Opposer.

Interrogatory No. 5: Identify each Person involved with or having knowledge of the selection, adoption, or first use of Applicant's Mark, and describe each such Person's knowledge.

Opposer here complains that Applicant has not supplied the address and phone number of Daniel Kelman and Milton I. Barr. In numerous previous conversations with Daniel Kelman, Opposer never once asked for Daniel Kelman or Milton I. Barr's address or phone number (presumably they already

had Daniel Kelman's phone number). Only now do they specifically request such information.

Daniel Kelman: (917) 426-5079 (Opposer has it because they have called it)

75 Logan Court

Shelburne, VT 05426

Milton Barr ((724) 777-7236

1934 Josephine

Pittsburgh, PA 15203

There is one other person: Masudur Rahman. He is a professional cricket player and web designer from Dhaka, Bangladesh. He assisted in developing some designs for the site that have not been used and will not be used. But that is all. His email is porosh07@gmail.com. Because he is in Bangladesh and inconvenient to call or visit, we only have his email (though we would like to see him play cricket one day). Due to company policy of not storing emails older than 90 days on google servers, I am no longer in possession of any correspondence with him, but such correspondence primarily took place during the Spring, Summer and early fall of 2012.

Interrogatory No. 7: Identify each good or service for which Applicant has used or intends to use Applicant's Mark.

Opposer complains that Applicants response only refers to intended goods and services to be associated with Opposer's mark and does not describe actual uses. This is because there aren't any, as had been orally explained to Opposer on numerous occasions and is made clear in Applicant's response. Applicant never transacted business with the mark Crapple. There was a website www.crapple.com in existence for a short time, but that site never had a customer offer to recycle any electronics (the site did not sell anything). Moreover, there were no products for sale, rather crapple.com offered to purchase used smartphones from the public.

Interrogatory No. 8: Identify the Channels of Trade through which Applicant distributes, has distributed, or intends to distribute Applicant's Goods and Services.

First, Opposer complains that Applicant's response only describes the Channel of Trade for goods, only services. This is because, as Opposer knows from numerous prior conversations, Crapple does not sell phones, Crapple was designed to be a site to purchase phones to be resold in unaffiliated storefronts and online—thus unaffiliated with the Crapple brand. The only intent has been to operate a site to purchase used phones to be resold online via different internet marketplaces and storefronts.

Lastly, Applicant feels no need to discuss plans to sell the smartphones purchased from Crapple.com, since as of right now there is no plan to use the Crapple name as a brand on used in connection with the sale of those phones.

Sincerely,

Daniel Kelman

EXHIBIT C

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. **85/379,097**

For the mark: **CRAPPLE**

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OPPOSER’S FIRST SET OF INTERROGATORIES TO APPLICANT

Pursuant to 37 C.F.R. §§ 2.116 and 2.120 and Rule 33 of the Federal Rules of Civil Procedure, Opposer Apple Inc. (“Opposer”) propounds the following interrogatories to be answered by Applicant Ninja Entertainment Holdings, LLC (“Applicant”) under oath within thirty (30) days of service hereof.

DEFINITIONS

- A. “Opposer” refers to Apple Inc.
- B. “Opposer’s Marks” shall refer individually and collectively to Opposer’s APPLE-based word marks and its Apple Logo, including but not limited to the marks underlying the applications and registrations in Paragraph 11 of Opposer’s April 17, 2012 Notice of Opposition.
- C. “Opposer’s Goods and Services” shall refer individually and collectively to all goods and services offered, sold, or promoted under or in connection with Opposer’s Marks, including but not limited to the goods and services covered by the applications and registrations

in Paragraph 11 of Opposer's April 17, 2012 Notice of Opposition.

D. "Applicant" refers to Ninja Entertainment Holdings, LLC, each of its predecessors, successors, parents, divisions, affiliates, or wholly-owned or partially-owned subsidiaries, and each of their officers, directors, employees, representatives, or agents.

E. "Applicant's Mark" means the mark CRAPPLE that is the subject of Application Serial No. 85/379,097.

F. "Applicant's Goods and Services" shall refer individually and collectively to all goods and services offered, sold, or promoted under or in connection with Applicant's Mark.

G. "Agreements" means any license, assignment, or other agreement.

H. "Channels of Trade" means the areas of commerce and means by which goods or services are marketed or sold. Channels of Trade include, but are not limited to, the sales agents, dealerships, distributors, or other outlets through which any goods or services are or have been sold.

I. "Applicant's Website" shall refer to the website available at <http://www.crapple.com/> and any other website, including but not limited to Facebook and Twitter pages, belonging to or in the control of the Applicant which uses the Applicant's Mark.

J. "Documents" includes "things" and is defined in the broadest sense permitted by the Federal Rules of Civil Procedure, including without limitation, written documents, audio or video recordings, and computer data. "Documents" includes each writing or record not identical to the original.

K. "You" or "Your" shall refer to Applicant as defined in paragraph D, above.

L. The singular and the plural shall be mutually interchangeable, and usage of words either in the singular or plural in the following Interrogatories shall not be construed to limit any

Interrogatory.

M. “Person(s)” means any individual, firm, partnership, corporation, proprietorship, association, governmental body, or any other organization or entity.

N. “Third Party” means any Person except Opposer and Applicant.

O. “Identify” or “specify” when used in reference to a Person who is an individual, means to state his or her full name, present or last known address and phone number, and present or last known position or business affiliation.

P. “Identify” or “specify” when used in reference to a Person who is a firm, partnership, corporation, proprietorship, association, or other organization or entity, means to state its full name, the legal form of such entity or organization, its present or last known address and telephone number, and the identity of its chief executive officer, partners, or Persons in equivalent positions.

Q. The conjunctive form “and” and the disjunctive form “or” shall be mutually interchangeable and shall not be construed to limit any Interrogatory.

R. The terms “any” and “all” shall be mutually interchangeable and shall not be construed to limit any Interrogatory.

S. The term “including” shall mean “including without limitation.”

T. The term “concerning” shall be interpreted broadly, including both explicit and implicit reference, and meaning, without limitation, relating to, regarding, referring to, constituting, defining, discussing, containing, construing, embodying, evidencing, supporting, refuting, reflecting, stating, dealing with, prepared in contemplation of, prepared in connection with, prepared as a result of, or in any way pertaining to.

INSTRUCTIONS

A. If You refuse to answer any Interrogatory in whole or in part based on a claim that any privilege applies to the information sought, state the privilege and describe the factual basis for your claim of privilege with such specificity as will permit Opposer to determine the legal sufficiency of the claim of privilege.

B. Each paragraph and subparagraph hereof and the definitions herein are to be construed independently, and not by or with reference to any other paragraph or subparagraph or definition herein if such construction would limit the scope of any particular Interrogatory or the subject matter thereof.

C. If any of these Interrogatories cannot be answered in full, You are to answer to the fullest extent possible, specifying the reason for Your inability to answer the remainder, and stating what information, knowledge, or belief You have concerning the unanswered portion.

D. These Interrogatories shall be deemed to be continuing. You are under a duty to supplement, correct, or amend your response to any of these Interrogatories if You learn that any response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to You during the discovery process or in writing.

E. Unless otherwise specified in the Interrogatory, these Interrogatories shall be deemed to seek information from January 1, 2009 to the present.

INTERROGATORIES

1. Describe in detail the circumstances surrounding the selection, adoption, use, and intended use of Applicant's Mark, including but not limited to any other names or marks that were considered.

2. Describe in detail how and why Applicant's Mark was selected.
3. Describe in detail all steps taken by Applicant to determine whether Applicant's Mark was available for use and registration prior to adoption.
4. Describe in detail when, where, and how Applicant's Mark is used and/or intended to be used.
5. Identify each Person involved with or having knowledge of the selection, adoption, or first use of Applicant's Mark, and describe each such Person's knowledge.
6. Describe in detail when and how Applicant first became aware of Opposer or Opposer's APPLE Marks, including the identification of all individuals having knowledge thereof.
7. Identify each good or service for which Applicant has used or intends to use Applicant's Mark.
8. Identify the Channels of Trade through which Applicant distributes, has distributed, or intends to distribute Applicant's Goods and Services.
9. Identify Applicant's typical or target customers of Applicant's Goods and Services.
10. Identify the annual unit and dollar volume of sales, from the date of first use to the present, for Applicant's Goods and Services.
11. Identify Applicant's annual expenditures for each advertising or promotional medium used to promote Applicant's Goods and Services.
12. Identify the Person(s) most knowledgeable about the sales and marketing efforts concerning Applicant's Goods and Services, and state the duties and position of each such individual.

13. Describe in detail each instance of which Applicant has actual or hearsay knowledge, directly or indirectly, of any communication, suggestion, or inquiry regarding an association, connection, or affiliation between Applicant, Applicant's Mark, or Applicant's Goods and Services, on the one hand, and Opposer, Opposer's Marks, or Opposer's Goods and Services, on the other hand, identify each Person involved in having knowledge of each such inquiry or communication.


14. Describe in detail all instances of which Applicant has actual or hearsay knowledge of any inquiry, complaint, or other communication regarding Applicant's business or any other inquiry, complaint, or other communication by any Person regarding the qualities, advantages, or lack of quality of Applicant's Goods and Services, and identify each Person involved in or having knowledge of such inquiry, complaint, or communication.

15. Identify every Person believed by Applicant to have relevant information with respect to any issue in this lawsuit and identify the relevant information such persons are likely to possess.

This the 30th day of July, 2012.

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: 

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Attorneys for Opposer Apple Inc.

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-----X		

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT has been served on Ninja Entertainment Holdings, LLC via e-mail to Daniel Kelman at danielkelman@gmail.com and depositing a copy with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to:

Daniel Kelman
3629 212th Street
Bayside, New York 11361-2048

This the 30th day of July, 2012.



Nichole Davis Chollet